No. ~~662~~ 30

In the Supreme Court of the United States

OCTOBER TERM, 1951

THE UNITED STATES OF AMERICA, APPELLANT

vs.

BEACON BRASS CO., INC., AND MAURICE FEINBERG

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

STATEMENT AS TO JURISDICTION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No. 51-288 Cr.

UNITED STATES OF AMERICA

v.

BEACON BRASS CO., INC., AND MAURICE FEINBERG

STATEMENT AS TO JURISDICTION

(Filed February 7, 1952)

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, and Rule 37(a) of the Federal Rules of Criminal Procedure, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order of the District Court in this cause dismissing the indictment.

OPINION BELOW

The memorandum opinion of the District Court, which states the grounds for dismissing the indictment, has not been reported. A copy thereof is attached hereto as an Appendix.

JURISDICTION

The order of the District Court dismissing the indictment was entered on January 10, 1952. The jurisdiction of the Supreme Court to review on direct appeal an order of a District Court dismissing an indictment, where such dismissal is based on the construction of the statute upon which the indictment or Information is founded, is conferred by the Criminal Appeals Act, 18 U. S. C. 3731. See also Rule 37(a)(2), F. R. Crim. P. The following decision sustains the jurisdiction of this Court: *United States* v. *Gilliland*, 312 U. S. 86, 89.

QUESTION PRESENTED

Whether Section 145(b) of the Internal Revenue Code, punishing an attempt in any manner to willfully evade or defeat the payment of taxes, embraces false statements made to that end, notwithstanding that Section 35 of the Criminal Code makes the giving of false statements in any matter affecting a government agency independently criminal.

STATUTES INVOLVED

INTERNAL REVENUE CODE:

Sec. 145. Penalties.

* * * * *

(b) Failure to Collect and Pay over Tax, or Attempt to Defeat or Evade Tax.—Any person required under this chapter to collect, account for, and pay over any tax imposed by

this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(26 U. S. C. (1946 ed.) Sec. 145.)

CRIMINAL CODE:

Sec. 35, as amended by the Act of April 4, 1938, 52 Stat. 197.

(A) . . whoever shall knowingly and willfully . . . . make or cause to be made any false or fraudulent statements or representations, ... in any matter within the jurisdiction of any department or agency of the United States . . . ., shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(18 U. S. C. (1946 ed.) Sec. 80; now 18 U. S. C. (Supp. IV) 1001.)

STATEMENT

A one-count indictment was returned, on September 14, 1951, against the defendants, in the United States District Court for the District of Massachusetts, charging that the corporation and Feinberg, its President and Treasurer, willfully attempted to defeat and evade a large part of the

taxes due and owing by the corporation for the fiscal year ending October 31, 1944, by making false and fraudulent statements and representations at a hearing before Treasury Department representatives on October 24, 1945, and on other occasions thereafter, concerning payments and disbursements made by the corporation, for the purpose of concealing additional unreported corporate net income on which a tax of approximately $134,910.68 was due and owing, all in violation of Section 145(b) of the Internal Revenue Code.

The defendants moved to dismiss the indictment, contending that it was duplicitous, and that it did not state an offense within the purview of Section 145(b), Internal Revenue Code.

The District Court held that the indictment did not charge an offense under Section 145(b) of the Internal Revenue Code, but rather an offense under Section 35(A) of the Criminal Code (18 U. S. C. (1946 ed.) 80, now 18 U. S. C. (Supp. IV) 1001)[1] which makes it an offense to make false statements or representations within the jurisdiction of any department or agency of the United States. The six-year statute of limitations applicable to offenses under Section 145(b) had not run when the indictment was returned, but the indict-

[1] Section 35(A) of the Criminal Code was repealed by Section 21 of the Act of June 25, 1948, 62 Stat. 683, 862, which codified into positive law Title 18 of the United States Code. The substance of Section 35(A) now appears in 18 U.S.C. (Supp. IV) 1001.

ment showed on its face that the three-year limitation period applicable to Section 35(A) of the Criminal Code had fully expired. In explanation of its holding, the District Court stated, in effect, that Section 145(b) of the Internal Revenue Code contemplates that many methods can be used to accomplish the crime of tax evasion, while Section 35(A) of the Criminal Code deals specifically with false statements and representations, and that Congress must be presumed to have intended that the making of false statements and representations should be punished under Section 35(A) rather than under Section 145(b). The court then dismissed the indictment on the ground that it did not charge an offense under Section 145(b).

THE QUESTION IS SUBSTANTIAL

The issue presented in this appeal is one of obvious importance in the administration of the federal income tax laws, for the effect of the decision of the District Court is to create two distinct statutory periods of limitation for offenses involving attempts to evade and defeat the payment of taxes. By construing Section 145(b) of the Internal Revenue Code to exclude the tax evasion case at bar, the court has removed cases of that class from the ambit of the six-year statute of limitations (26 U. S. C. 3748(a)(3) and has placed them under the general three-year statute, although Congress has expressly provided that the six-year statute shall apply to offenses involving willful attempts to

evade and defeat the payment of taxes. Indeed, if the decision of the District Court is permitted to stand, the Government will be faced with another dual statutory difficulty in tax evasion cases, for if a false representation with respect to income in a tax evasion matter is an offense separate and distinct from the offense of attempting to evade and defeat payment of the tax, a serious question will undoubtedly arise as to whether pertinent false statements and representations may be used as evidence in a Section 145(b) case which involves other elements of evasion.

Section 145(b) in sweeping terms makes it an offense to attempt to evade or defeat "in any manner" the payment of a tax. Thus, in *Spies* v. *United States*, 317 U. S. 492, 499, this Court said:

> Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished "in any manner." By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of

> the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out * * *.

The language of Section 145(b), on its face and as thus construed, is plainly broad enough to encompass false statements and representations willfully made to Treasury representatives for the purpose of evading or defeating the payment of a tax.

The fact that there is another penal statute (Section 35(A)) of the Criminal Code (now 18 U. S. C. (Supp. IV) 1001) directed at false statements with respect to any matter within the jurisdiction of any federal department or agency does not affect the breadth of Section 145(b). The offense of attempting to evade or defeat the payment of a tax plainly contains elements different from the offense of making a general false statement or representation within the jurisdiction of a department or agency of the United States under Section 35(A) of the Criminal Code, and different evidence is required to sustain it.

The rule underlying the Government's construction of the statute has long had the approval of this Court. *Edgington* v. *United States*, 164 U. S. 361, 363; *Gavieres* v. *United States*, 220 U. S. 338, 345; *Morgan* v. *Devine*, 237 U. S. 632, 637-641; *Albrecht* v. *United States*, 273 U. S. 1, 11-12; *United States* v. *Noveck*, 273 U. S. 202, 206. In *United States* v.

Gilliland, 312 U. S. 86, 95, this Court held that Section 35 of the Criminal Code was but a "fitting complement" to the so-called "Hot Oil" Act of February 22, 1935, 49 Stat. 30, 31. And in *Edwards v. United States*, 312 U. S. 473, 483-484, this Court held that the Securities Act of 1933, making it unlawful to use the mails to defraud by the sale of securities, and the general mail fraud statute "can exist and be useful, side by side." Cf. *United States* v. *Borden Company*, 308 U. S. 188, 198, 199.

The lower courts have likewise held that offenses created by different statutes, which arise out of the same acts, are to be considered separate offenses if they contain different elements and require different evidence to sustain them, and that such statutes may stand together. *Gaunt* v. *United States*, 184 F. 2d 284 (C.A. 1), certiorari denied, 340 U. S. 917, 939; *Capone* v. *United States*, 51 F. 2d 609, 615 (C.A. 7), certiorari denied, 284 U. S. 669; *O'Brien* v. *United States*, 51 F. 2d 193, 196 (C.A. 7), certiorari denied, 284 U. S. 673; *Levin* v. *United States*, 5 F. 2d 598, 599-600 (C.A. 9), certiorari denied, 269 U. S. 562; *Steinberg* v. *United States*, 14 F. 2d 564 (C.A. 2); *Bartlett* v. *United States*, 166 F. 2d 920, 926-927 (C.A. 10); *Ex parte Berkoff*, 65 F. Supp. 976 (D.C. Minn.).

In the case at bar, it is beyond reasonable argument that the willful intent to evade and defeat a tax required to create an offense under Section

145(b) of the Internal Revenue Code is different from any of the elements required to create an offense under Section 35(A) of the Criminal Code, and the evidence required to sustain a conviction under Section 145(b) is necessarily different.

It is submitted that the decision of the District Court is erroneous and that the question presented by this appeal is a substantial one which should be settled by the Supreme Court.

Respectfully submitted,

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Solicitor General.

(S.) GEORGE F. GARRITY,
United States Attorney.

(S.) HAROLD G. JACKSON,
Assistant U. S. Attorney.

APPENDIX

UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

Criminal No. 51-288

UNITED STATES OF AMERICA

v.

BEACON BRASS CO., INC. AND MAURICE FEINBERG

MEMORANDUM—January 10, 1952

McCARTHY, *D. J.*:

The defendants have filed a motion to dismiss the indictment because it is duplicitous and because it does not state an offense within the terms of Title 26, U. S. C. A., § 145(b).

A similar indictment was dismissed on motion by this Court on April 27, 1951 (Criminal No. 51-55). I quote from the memorandum filed on that date: "The return of the Beacon Brass Company, Inc., for the fiscal year ending October 31, 1944, was filed with and received by the Collector of Internal Revenue in Boston, Massachuetts, on either January 5 or January 15, 1945. The stamp of the receiving office, which appears to be indistinct, reads 'January 5, 1945'. But since the check of the Beacon Brass Co., Inc., in payment of its reported tax was dated January 15, 1945, I would find as a fact if it were important (which it is not), that the return was filed on January 15, 1945. The six-year statute of limitations against the filing of a false return in violation of 26 U. S. C. A., § 145(b) commenced to run on that date. The in-

dictment in this case was not returned by the Grand Jury until March 16, 1951, which is well over the six-year period * * *. The present indictment in one count * * * (charges) a violation of 26 U. S. C. A., § 145(b), *plus the making of false statements at a hearing and conference before the representatives and employees of the United States Treasury Department on October 24, 1945.* This is bad pleading. *If the United States wanted to allege a violation of 18 U. S. C. A., (1940 ed.) § 80; (18 U. S. C. A., §1001, 1948 ed.),* for the making of false statements, it should have set it forth succinctly in the language of the statute * * *" (Emphasis supplied.)

The indictment with which we are here concerned was returned on September 14, 1951, charging the defendants with violation of 26 U. S. C. A. § 145(b) in that the individual defendant made fraudulent statements on October 24, 1945 to Treasury Agents concerning payments and disbursements by the corporate defendant for the purpose of concealing additional unreported income. The only difference, therefore, between this indictment and the indictment in Criminal No. 51-55 in this Court is that no mention is made here by the Government of the fact that the corporation filed its tax return in January of 1945.

This indictment does not charge that the defendants violated 18 U. S. C. A., § 1001. A prosecution in 1951 under this statute for a false statement in 1945 would be barred by the three-year statute of limitations. The Government contends, however, that the act of making fraudulent representations to a Treasury Agent to "support and

bolster a fraudulent return" is in and of itself a violation of 26 U. S. C. A., § 145(b) which forbids evasion of income tax "in any manner", and to which the six-year statute of limitations is applicable.

Section 145(b) of Title 26, U. S. C. A., contemplates that many methods can be used to accomplish the crime of tax evasion. On the other hand, Section 1001 of Title 18 deals specifically with a situation such as is presented here. In passing the latter statute Congress must be presumed to have intended that making false statements should be punished thereunder. There is a different penalty provided than under 26 U. S. C. A. § 145(b), and Congress thereby emphasized the distinctness of the two offenses. *Creel* v. *United States*, 8 Cir., 21 F. 2d 690, 691.

The Court concludes that the act alleged in this indictment is not such an act as was contemplated by the provisions of 26 U. S. C. A. § 145(b), and that the indictment, therefore, must be and it is hereby dismissed.

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